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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. .

ROBERT M. LEACH, EXECUTOR,
PLAINTIFF, DEFENDANT IN ERROR, PETITIONER,
v.
MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

The petitioner, Robert M. Leach, as executor of the estate of William E. Walker, late resident of Taunton, Massachusetts, earnestly prays that a writ of certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of *Nichols* v. *Leach*, 50 Fed. (2) 787 (Rec. pp. 163–174), which reversed the decision in *Leach* v. *Nichols*, 42 Fed. (2) 918 (Rec. p. 147–157) wherein the District Court rendered judgment for the plaintiff, your petitioner, in the amount of $5,672.91, together with costs.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 938; U. S. Code, Title 28, Sec. 347.

The opinion of the Circuit Court of Appeals was rendered on June 10, 1931, but the appellee, petitioner herein, seasonably filed a petition for rehearing, which was denied by an order dated July 22, 1931 (Rec. p. 195). This petition was filed within three months of the date of the aforesaid order of denial, as

required by Section 8 of the Act of February 13, 1925, *supra* (U. S. Code, Title 28, Sec. 350).

Notice of the filing of this petition, together with a copy of the petition, printed record and supporting brief has been duly served by the petitioner upon counsel for the respondent and due proof of such service filed with the clerk, as required by Rule 38 of this Court.

Two questions are respectfully presented for the decision of this Court, as follows:

THE QUESTIONS PRESENTED.

First: As a matter of law:

Did the Circuit Court of Appeals err in holding that the tax imposed upon the estate by General Laws of Massachusetts, Chapter 65, was not a proper deduction, for the purpose of the Federal Estate Tax, as provided in Section 203 of the Revenue Act of September 8, 1916, as amended?

Second: As a matter of procedure:

Was the above question—the sole ground upon which the decision of the District Court was reversed—properly before the Circuit Court of Appeals in view of the fact that the appellant did not set forth that defense in his answer or in oral argument at the trial, but admitted, in open court, that other courts had already decided the question, so that the District Court considered that question as res adjudicata, did not rule thereon, and decided the case on two entirely different grounds?

With the controversy thus limited, the only statutes involved are as follows:

STATUTES INVOLVED.

1. General Laws of Massachusetts, Chapter 65:

"SUBJECTS AND RATES OF TAXATION.

"Section 1. *All property* within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, *which shall pass* by will, or by laws regu-

lating intestate succession, . . . shall be subject to a tax at the percentage rates fixed by the following table: . . ."

"Section 6. *Administrators, executors* and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, *shall be liable for the taxes imposed by this chapter,* with interest, until the same have been paid.

"Section 7. *Taxes imposed by this chapter upon property* or interests therein, *passing by will* or by laws regulating intestate succession, *shall be payable to the state treasurer by the executors,* administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent, or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled. . . ."

"Section 9. Property of which a decedent dies seized or possessed, subject to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, *shall be charged with a lien for all taxes* and interest thereon which are or may become due on such property: . . ." (Italics ours.)

2. Revenue Act of September 8, 1916, as amended (39 Stat. 777, c. 463; Comp. Stat. (1918), Section 6336¼d):

"THE NET ESTATE."

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, *claims against the estate* . . . and *such other charges* against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and . . ." (Italics ours.)

The essential facts of the case, briefly stated, are as follows:

STATEMENT OF THE FACTS.

Under the Massachusetts statute, *supra*, the petitioner, as executor, was required to pay and did pay taxes in the amount of $34,158.59. The bill for the tax was addressed to him as such executor (Rec. pp. 142–144), the tax was paid by him out of the proceeds of the estate before its distribution, and the Probate Court allowed the item in the executor's final account.

At the time the Federal estate tax return was filed, as well as when this suit was originally brought, Treasury Decision No. 2524 expressly prohibited the deduction of any such State taxes under Section 203 of the Federal Act, *supra*. However, while this suit was still pending for decision in the District Court the Court of Claims decided the case of *Merrill et al.* v. *United States*, 68 Ct. Cl. 136, which held that the Massachusetts tax was such proper deduction. On the strength of the decision in the Merrill case, from which the Government took no appeal, and other decisions which had held that the Massachusetts tax, and such taxes of other states, were proper deductions under Section 203 of the Act, *supra*, the plaintiff, petitioner herein, amended his original declaration (Rec. pp. 12–16) and alleged, among other things, that in arriving at the amount of the Federal tax the estate was entitled, under Section 203, *supra*, to deduct the $34,158.59 which had been paid as above stated to the Commonwealth of Massachusetts.

The defendant's answer to the plaintiff's amended declaration (Rec. pp. 19–20) contains no allegation that, as a matter of law, the Massachusetts tax was not such proper deduction and when the case came on for trial on the amended pleadings Judge Brewster of the District Court, making special reference to the question of whether or not the defendant would contend that

the Massachusetts tax was not a proper deduction, asked, and counsel for the defendant replied (Rec. p. 177), as follows:

> "The COURT. Apart from technicalities, and getting at the justice of the thing, you have collected some taxes you ought not to have in view of the decisions of the Court in regard to deducting the collected State taxes?
>
> Mr. SABINE. There is no doubt that the Massachusetts Inheritance Tax has been held to be deductible from the gross estate."

Thereafter, throughout the entire proceedings in the District Court no further reference was made to the question of whether or not, as a matter of law, the Massachusetts tax was a proper deduction under Section 203 of the Act of 1916, nor is any reference made to that question in the defendant's requests for conclusions of law (Rec. pp. 62–64) which were submitted to the District Court at the conclusion of the oral argument. In view of these facts, the opinion of the District Court (Rec. p. 151) passes over the question of the Massachusetts tax and decides the case on two entirely different grounds, to wit:

> "It is obvious that the United States had demanded and received a tax levied upon the estate of plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court.
>
> Defendant now seeks to defeat a recovery of this illegally exacted tax by urging,
>
> (1) That the court is without jurisdiction to entertain the suit since it was prematurely brought;
>
> (2) That no claim for refund upon the grounds now relied upon was filed within four years from date of payment of the tax."

In marked departure from these two issues, which alone the District Court decided and ruled upon, the chief error assigned by the appellant (Rec. pp. 158, 160) and the main argument advanced on appeal, was that, as a matter of law, the Massachusetts tax was not a proper deduction under Section 203 of the Act. Likewise the Circuit Court of Appeals entirely disre-

garded the two issues decided by the District Court and said (Rec. p. 167):

> "However, it is unnecessary to determine whether a claim for refund can be amended by inserting entirely new grounds after the four year period of limitation has expired, as we think the District Court erred in holding that the Massachusetts succession tax was deductible, which is decisive of the case, as all other claims for refund in the amended declaration were properly disallowed."

Upon the law, the facts and the proceedings, the petitioner submits that the Circuit Court of Appeals erred in the following respects:

ASSIGNMENTS OF ERROR.

First: As a matter of Law:

The Circuit Court of Appeals erred in holding that the tax imposed by General Laws of Massachusetts, Chapter 65, which was paid by the executor from the proceeds of the estate before distribution and allowed in his account in the Probate Court, was not a proper deduction, for the purpose of the Federal estate tax, under Section 203 of the Revenue Act of September 8, 1916, as amended.

Second: As a matter of procedure:

The Circuit Court of Appeals erred in reversing the judgment of the District Court solely on a question which was not presented for decision or ruled upon by the District Court.

As reasons for the allowance of this petition the petitioner respectfully submits the following:

REASONS SUBMITTED FOR THE ALLOWANCE OF THIS PETITION.

First: The case presents important questions both of procedure and of statutory construction involving a Federal law and also a State law, which have not been, but which should be, as a matter of public concern, conclusively settled by this Court.

Second: The decision of the Circuit Court of Appeals is the only instance in which any court has ever held that the tax

imposed by General Laws of Massachusetts, Chapter 65, *supra*, was not a proper deduction under Section 203 of the Revenue Act of 1916, *supra*, and is directly in conflict with two decisions of the District Court of Massachusetts and a decision of the Court of Claims on that precise question, as well as with a long line of decisions of this Court and other courts involving the same underlying principles:

Keith v. *Johnson*, 44 S. Ct. 415; 271 U. S. 1;
United States v. *Field*, 41 S. Ct. 256; 255 U. S. 257;
Lederer v. *Northern Trust Company* (Third Circuit), 262 Fed. 52; certiorari denied, 40 S. Ct. 483; 253 U. S. 487;
Miles v. *Curley* (Fourth Circuit), 291 Fed. 761; certiorari not applied for.
Thayer v. *Malley* (Dist. of Mass., Morton, J.), 3 Fed. (2) 194;
Leach v. *Nichols* (Dist. of Mass., Brewster, J.), 42 Fed. (2) 918;
Merrill v. *United States*, 66 Ct. Cl. 136; certiorari not applied for.

Third: The Circuit Court of Appeals for the First Circuit, in reversing the judgment of the District Court in this case solely on a question which was not presented for decision or ruled upon by the District Court, has so far departed from the accepted and usual course of judicial procedure as to call for this Court's power of supervision.

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
United States v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9;
San Juan Light & T. Co. v. *Requena*, 224 U. S. 89;
Lesser Cotton Co. v. *St. Louis, I. M. & S. R. Y. Co.*, 114 Fed. 133, 142-143.

CONCLUSION.

WHEREFORE your petitioner, by his undersigned counsel, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to send to this Court for its review and deter-

mination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled Malcolm E. Nichols, Former Collector of Internal Revenue, Defendant, Appellant, *v.* Robert M. Leach, Executor, Plaintiff, Appellee, being designated and numbered on its docket October Term 1930, No. 2554, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court to the end that your petitioner may have the relief herein prayed for, and such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Respectfully submitted,

ROBERT M. LEACH, *Executor of the Estate of William E. Walker, by his Attorney,*
O. WALKER TAYLOR,
11 Beacon Street, Boston, Massachusetts.

CERTIFICATE.

I hereby certify that I am counsel for the petitioner herein, Robert M. Leach, executor of the estate of William E. Walker; that in accordance with the request of said petitioner the within petition has been presented; that the allegations contained in said petition are true, to the best of my knowledge and belief; and that said petition is in my opinion well founded in law and in fact and should be granted.

O. WALKER TAYLOR.

COMMONWEALTH OF MASSACHUSETTS.
COUNTY OF SUFFOLK, ss.

BOSTON, MASSACHUSETTS, October 19, 1931.

Then personally appeared O. Walker Taylor of Boston, Massachusetts, and made oath that he prepared and signed the foregoing petition and that the same is prepared with the consent

of and in accordance with the request of the petitioner named therein and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

FRANK J. LINEHAN, Jr.,

[SEAL] *Notary Public.*

My commission expires October 22, 1937.

BRIEF IN SUPPORT OF PETITION.

STATEMENT.

The voluminous record in this case, your petitioner begs to explain, was brought about by the fact that the appellant, the respondent herein, insisted upon including in the record everything that had taken place in the course of the extended proceedings in the case, most of which is entirely irrelevant to the issues herein presented.

Your petitioner believes that the statement of facts embodied in the petition are entirely sufficient for this purpose.

In support of the allowance of the petition the following is respectfully submitted:

ARGUMENT.

I.

THE CASE PRESENTS IMPORTANT QUESTIONS OF STATUTORY CONSTRUCTION INVOLVING A FEDERAL LAW AND ALSO A STATE LAW AS WELL AS A QUESTION OF PROCEDURE, WHICH HAVE NOT BEEN, BUT WHICH, AS A MATTER OF PUBLIC CONCERN, SHOULD BE CONCLUSIVELY SETTLED BY THIS COURT.

In the case at bar it seems obvious that the specific issue of law presented must turn upon the "nature" of the tax imposed by the Massachusetts statute, *supra*. If the tax imposed under that statute is a tax upon the "receipt" of property, or, in other words, upon the "legacy" as a separate entity, then the tax would not seem to be a "claim" or "charge" against the estate under the Federal statute. On the other hand, if the Massachusetts tax is imposed upon the "transfer" of the property of the estate, as your petitioner contends that it is, then the Massachusetts tax would seem to be a proper deduction under Section 203, *supra*, of the Act. The decisions of the highest court of Massachusetts are in hopeless disagreement on the question of just what is the "nature" of the Massachusetts tax.

The Circuit Court of Appeals for the Fourth Circuit was con-

fronted with exactly the same situation in regard to the tax imposed upon estates by the statutes of Maryland, and in the case of *Miles* v. *Curley et al.*, 291 Fed. 761, which held that the Maryland tax *was* a proper deduction under Section 203, *supra*, that Court at page 763 of the opinion said:

> "The decision by the highest court of Maryland, directly deciding this question, and construing the statute imposing such collateral inheritence tax, would be binding upon this court. Is there any such decision?
>
> In discussing this question, the learned district judge, in his opinion overruling the demurrer to the declaration herein, says:
>
> > 'In the case at bar, each side has argued that the Court of Appeals of this State has interpreted the act in the sense for which it contends, and each quotes language which, if standing alone, might sustain its position. That each is able to do so is perhaps the best proof that the attention of that high court never had been drawn to the precise point now at issue, in such sense, at least, as to call for its definite determination.'"

The opinion of the Circuit Court of Appeals (Rec. p. 170) cites three of the Massachusetts cases in the opinions of which language is found which seems to indicate that in its nature the Massachusetts tax is imposed upon the "receipt" instead of the "transfer" of the property of the estate.

Attorney General v. *Stone*, 209 Mass. 186;
Boston Safe Deposit & Tr. Co. v. *Com'r. of Corp. & Tax.*, 267 Mass. 240;
Saltonstall v. *Saltonstall*, 276 U. S. 260.

However, there are numerous other Massachusetts decisions not referred to in that opinion which seem to hold that the Massachusetts tax is in its nature a tax upon the "transfer" and not upon the "receipt" of property.

Magee v. *Commissioner of Corp'ns & Tax.*, 256 Mass. 513;
Hollis v. *Treas. & Rec. Gen.*, 242 Mass. 163;
Pratt v. *Dean*, 246 Mass. 300;

Bingham v. *Com'r of Corp. & Tax.*, 249 Mass. 79.

As stated in the petition, the decision of the Circuit Court of Appeals in this case is the only instance in which any Court has held that the Massachusetts tax is imposed upon the "legacy", as a separate entity, and thus improperly deductible by the "estate" under the Federal statute. On the other hand, both Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley*, 3 Fed. (2) 194, and Judge Brewster, in the instant case, as well as the Court of Claims in the case of *Merrill et al.* v. *United States*, 66 Ct. Cl. 136, have held that the Massachusetts tax is in its nature a "transfer" tax and therefore properly deductible under the Federal statute. The Government did not apply for certiorari in the Merrill case. In that case Judge Moss of the Court of Claims commented upon two decisions of this Court and said:

> "The attention of the Court is called to the fact that the decision in the case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, overruled the *Thayer* v. *Malley Case* on that point, but it should also be noted that the later case of *Keith* v. *Johnson*, 271 U. S. 1, in turn reversed the ruling in the *Eisner Case* on the same point. In the case of *Keith* v. *Johnson*, which involved the question of the deductibility of the New York inheritance tax from the gross income of the estate for Federal income tax purposes, the Court held that the inheritance tax was deductible, citing with approval *United States* v. *Woodward*, 256 U. S. 632. In *United States* v. *Mitchell*, 271 U. S. 9, decided on the same day, the Court confirmed the right of the executor to deduct the Texas inheritance tax from the gross income of the estate, holding that the Texas law was similar to that of New York. In this connection it should be observed that the New York inheritance tax law in its essential provisions is identical with the Massachusetts Statutes and it was so declared in the *Thayer-Malley Case.*"

It is thus apparent that the Court of Claims in the *Merrill Case* seems to have been guided by the language used by this Court in the *Keith* v. *Johnson Case* in holding that a tax of this

character is imposed upon the "transfer" and not upon the receipt of property. On the other hand, the Circuit Court of Appeals for the First Circuit seems to have been guided by the language used by this Court in the *New York Trust Company* v. *Eisner Case* in holding that such taxes are imposed upon the "separate legacies as distinct entities" and not upon the "transfer" of the estate.

Aside from all consideration of the case at bar, your petitioner earnestly believes that a decision by this Honorable Court definitely settling the status of such State taxes will be of great public interest and usefulness. Such a decision would be of great value not only to the citizens of the Commonwealth of Massachusetts, but it would also be useful to the administrative officers of the Government, as well as to the general public, in connection with many questions constantly arising under the Federal statutes where the Massachusetts tax, and such taxes of other States, are involved.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN THIS CASE IS DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT AS WELL AS WITH THOSE OF OTHER COURTS INVOLVING THE PRECISE ISSUES.

First: As to the decisions of this Court:

As pointed out by the Court of Claims in the decision of *Merrill et al.* v. *United States, supra*, the language of the Massachusetts statute is almost identical with that of the State of New York. As to the nature of the New York tax, Mr. Justice Butler, who delivered the opinion in the case of *Keith* v. *Johnson, supra,* said:

> "The transfer tax law imposes a tax 'upon the transfer of property' from the deceased (section 220) at rates graduated, according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. Sections 221, 221 (a). Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representa-

> tives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. Section 224. They are not entitled to discharge until the tax is paid. Section 236. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But, by whomsoever the amount may be handed over to the state, the tax is in effect an appropriation by the state of a part of the property of the deceased at the time of death, and the state's portion is deductible from the legacy and does not pass to the legatee."

Your petitioner respectfully submits that this language is directly applicable to the wording of the Massachusetts statute, *supra*, and that being the case the Massachusetts tax must be a proper deduction under Section 203, *supra*, of the Federal statute.

The opinion of the Circuit Court of Appeals is directly in conflict with still another decision of this Court. The opinion (Rec. pp. 172, 173) states:

> "However, this court in *Old Colony Trust Co.* v. *Malley*, 19 Fed. (2d) 346, held in principle, if not expressly, that Massachusetts succession taxes should not be deducted in arriving at the net estate of a decedent. It was determined in that case that the provision in Sec. 403 (a) (1) of the Revenue Act of 1918, that estate and succession taxes should not be deducted, was merely declaratory of the intent of Congress in Sec. 203 (a) (1) of the Act of 1916; that it was as the committee of Congress stated at the time the change was proposed, merely "intended for the sake of clarification."

But, in the case of *United States* v. *Field*, 41 S. Ct. 256; 255 U. S. 257 (see Rec. p. 85), Mr. Justice Pitney who delivered the opinion said that the language used by the committee in connection with Sections 402 and 403 of the Act of 1918, which took the place of Sections 203 and 204 of the Act of 1916,

should not be construed as merely "for the sake of clarification" of the earlier act, for, if that had been the intent of the legislation, "it would have been easy for Congress to express" such purpose as it did do in the later Act.

Second: As to the decisions of the Court of Claims and the District Court of Massachusetts:

As to the two decisions of the District Court on the precise question here involved and that of the Court of Claims in the case of *Merrill et al.* v. *United States, supra*, sufficient comment has already been given. Your petitioner respectfully submits, however, that since the Government did not apply for certiorari in the Merrill case and, as a matter of common knowledge, settled other cases involving the Massachusetts tax then pending in the Court of Claims, that decision should have been followed by the Circuit Court of Appeals in the instant case, otherwise the Federal taxing statutes are not equally and uniformly applied to different taxpayers in exactly the same position, which is in violation of the fundamental principles of the Constitution of the United States.

Third: As to the decisions of the Supreme Judicial Court of Massachusetts:

As stated above, the opinion of the Circuit Court of Appeals adheres to only one group of the conflicting decisions of the highest court of Massachusetts on the question of the nature of the Massachusetts tax. Four cases on this point have been cited above. It is not necessary to quote the language used in the opinions of these four cases and the other Massachusetts cases to the same effect. The language used in the opinion of *Hollis* v. *Treas. & Rec. Gen.*, 242 Mass. 163, is typical of this group of cases. In the opinion in that case Mr. Chief Justice Rugg in interpreting the Massachusetts statute said:

> "It is plain as a practical matter that the amount of money so paid for excise taxes never passes to anybody by succession from the deceased resident. Money so paid is a pecuniary burden laid for the support of government upon the privilege of transmitting and receiving property by will or by intestate succession. A succession tax law

> ought not to be so interpreted as to exact an excise on the succession of that which in fact cannot pass to any beneficiary because seized by the State on its way from the dead to the living, unless the words of the statute leave no other alternative. *Newcomb* v. *Paige*, 224 Mass. 516. Such a tax apart from its technical legal significance, would be in substance and effect a tax on a tax and not a tax on the succession of property. . . . By G. L. c. 65, § 1 (which does not differ in this respect from pre-existing statutes), 'All property within the jurisdiction of the Commonwealth . . . which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax.' . . . If the executor takes the property directly he must, in order to secure a transmissible title, invoke the laws of such taxing State and pay the tax. *Bliss* v. *Bliss*, 221 Mass. 201, 205. In either event the actual amount of property which he can transmit under the will must be depleted by the amount of the taxes so paid. . . ."

Fourth: As to the conflicting decisions of other Circuits:

As pointed out above, the decision of the Circuit Court of Appeals for the First Circuit in this case is directly in conflict with decisions of the Third and Fourth Circuits.

> *Lederer* v. *Northern Trust Company*, 262 Fed. 52; certiorari denied, 40 S. Ct. 483;
> *Miles* v. *Curley*, 291 Fed. 761; certiorari not applied for.

These two cases involve the question of the deductibility, under Section 203 of the Revenue Act of 1916, of the taxes imposed upon estates by the statutes of Pennsylvania and Maryland. The statutes of those States, your petitioner respectfully submits, are, in their essential respects, like the Massachusetts statutes. Under all of these statutes the taxes must be paid out of the property of the estate before its distribution, and the executor is liable for the payment of such taxes.

Your petitioner respectfully submits, therefore, that the decision of the Circuit Court of Appeals in this instance is in conflict with the great weight of authority on the issues involved, and that it results in an unjust discrimination against the estate

which your petitioner represents as compared with other estates, both in Massachusetts and elsewhere in exactly the same position, thus violating the fundamental principles of the Constitution of the United States.

III.

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN REVERSING THE JUDGMENT OF THE DISTRICT COURT SOLELY ON A QUESTION WHICH WAS NOT PRESENTED FOR DECISION OR RULED UPON BY THE DISTRICT COURT.

It is a universal rule, with few exceptions, that Courts of Review will consider only those questions which have been presented to and ruled upon by the lower Court, and that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the lower Court.

In the case of *San Juan Light & T. Co.* v. *Requena*, 224 U. S. 89, Mr. Justice Van Devanter, who delivered the opinion of this Court, said:

> "Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

In the case of *Tucker* v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228, Mr. Justice Stone delivered the opinion of this Court and said:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

In the case of *United States* v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9, Mr. Justice Butler, who delivered the opinion, said:

> "It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been

decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall*, 45 S. Ct. 148, 266 U. S. 507, 511, 69 L. Ed. 411."

In view of the facts of the instant case, as stated in the petition, your petitioner respectfully submits that the sole question upon which the Circuit Court of Appeals reversed the judgment of the District Court was not presented for decision or ruled upon by the District Court and that there is a clear variance between the question decided by the Circuit Court and the questions which were decided by the District Court.

CONCLUSION.

Your petitioner respectfully submits, therefore, that this Honorable Court should grant certiorari in this case.

Respectfully submitted,

O. WALTER TAYLOR,

Attorney for the Petitioner.